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No. 94-1427

In The
Supreme Court of the United States

October Term, 1994

CHARLES S. DEAN, Sheriff of Citrus County, Florida,

Petitioner,

vs.

JOSEPH RICHARD REDNER and
ROBERT BUTTERWORTH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it is proper in assessing the constitutionality of an ordinance to initially consider the fourfold test of ***United States v. O'Brien*** and, if justifying same by the *O'Brien* test, to then evaluate the same ordinance for the existence of procedural safeguards as required by ***FW/PBS, Inc., v. City of Dallas***.

2. Whether there is any validity to the suggestion that there is any "discord" or "confusion" regarding the tests set forth in ***Barnes v. Glen Theatre, Inc.***, and ***FW/PBS, Inc., v. City of Dallas***, when there is, in fact, no conflict whatsoever between the decisions and no evidence of a lack of uniformity.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Petitioner, Charles S. Dean, as Sheriff of Citrus County, Florida, and the Respondents, Joseph Richard Redner, and Robert Butterworth, the Attorney General of the State of Florida.

There are no entities to report or list pursuant to Supreme Court Rule 29.1.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Joseph Richard Redner, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Charles S. Dean, Sheriff of Citrus County, Florida.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals affirmed the ruling by the district court granting the petition for writ of habeas corpus to Respondent, Redner. That decision is reported at ***Redner v. Dean***, 29 F.3d 1495 (11th Cir. 1994). This decision is set out as Appendix "B" of the Petition. Following issuance of the Eleventh Circuit Opinion, the Petitioner moved for rehearing and suggestion for rehearing *en banc*. Both of which were denied on November 2, 1994. This denial is set out as Appendix "C" of the Petition.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law ... abridging the freedom of speech ...

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

ORDINANCES ENACTED BY CITRUS COUNTY, FLORIDA

Citrus County, Florida, Ordinance 88-05 is set out as Appendix "H" of the Petition.

STATEMENT OF THE CASE

In early March of 1988, Redner became interested in opening and operating an adult entertainment establishment in Homosassa Springs, an unincorporated community located in Citrus County, Florida. In this endeavor, Redner investigated all applicable Citrus County ordinances, rules, regulations and permitting requirements.

On the basis of this investigation, which included direct inquiries to Citrus County employees regarding any such restrictions which applied to the contemplated business, Redner determined properly that there were no regulatory obstacles in effect which would prevent him from opening an adult entertainment establishment at a specific premises.

On or about March 17, 1988, on the basis of this reliance, Redner entered into a lease for a contemplated premises for eighteen (18) months, thereby incurring an obligation of $36,000.00 for the term of the lease. At this point in time, Redner also undertook repairs and alterations to the premises at a cost of approximately $10,000.00.

In an effort to comply with requirements to open the business, the proper local agencies were contacted. On March 23, 1988, the premises was inspected by the Citrus County Public Health Unit for food service inspections and permits. A fire inspection was also conducted. The proper permits were issued on March 24, 1988. Also on that date, after Redner specifically described the proposed business to County officials in his attempt to get all proper licenses and permits, the Citrus County Tax Collector issued occupational licenses for "Dance Hall," "Entertainment Cafe," and one for "Merchandise Vending Machines" in preparation for the imminent opening of the business establishment. No specific occupational license designation existed at that time relating to adult entertainment facilities.

No attempt was made to hide the intended use of the leased premises from any Citrus County employee consulted, or from the public in general. As a result of this, it can only be presumed that communications among the employees and citizens of Citrus County fueled the attention which the anticipated opening of the establishment received during this period of time. The event was surrounded by extensive media attention. No other adult entertainment facility existed in Citrus County prior to Redner's endeavor.

On March 25, 1988, the date Redner had anticipated opening his establishment, and after Redner had spent substantial sums renovating the property for his anticipated use, acquired the proper occupational licenses required at the time he applied for them, and obtained the above referenced inspections, the Citrus County Board of County Commissioners met in emergency session and enacted Citrus County Ordinance 88-05, an

emergency ordinance establishing licensing requirements for adult entertainment establishments and their employees. The nature of any alleged "emergency" is unknown other than the anticipated opening of Redner's use. A copy of Ordinance 88-05 is set out as Appendix "H" to the Petition.

Emergency Ordinance 88-05 imposed the requirement that a license be obtained prior to the presentation of any constitutionally protected expression by any business deemed to be an adult use. This application required the submission of extensive information and lengthy investigation by several administrative and law enforcement agencies. While there was a time limit for the granting or denial of a license, the proposed licensee obtained no mandatory right to engage in protected expression at the expiration of the time limit and the provisions dealing with the appeal of any such denial contained no time limit whatsoever. The fee for any such license was $750.00.

The Ordinance also imposed similar requirements that any employee working at any adult use establishment similarly obtain an adult use permit to legally be employed at any such establishment. The application requirements were again extensive and the time limits for the granting or denial of any application for such a permit, while limited, had no such limitation on any appeal process of the denial of any permit. A fee of $50.00 was required with any permit.

Section 5 of the Ordinance established criminal penalties for any failure to comply with any provision of Citrus County Ordinance 88-05. No provision for judicial review appeared anywhere in emergency Ordinance 88-05. The only appeal of any state action occasioned by the Ordinance or wrongful denial of a license was to the Board of County Commissioners, the same

body with the ultimate responsibility for the administration of the Ordinance (Section 6-1), and the same body that would have rejected the license in the first place. There was no time limit or deadline for the scheduling of any appeal hearing whatsoever.

On March 29, 1988, Redner opened his establishment, and was arrested and charged with operating an adult entertainment establishment without a license. Redner has maintained that he did not do this in open defiance, but rather as a reaction to the alleged "bad faith" implied by the sequence of events surrounding the enactment of the Ordinance. Two subsequent attempts to open the establishment also resulted in arrest.

For Redner's first two arrests, bond was placed at $500.00. On March 31, 1988, when Redner was arrested the third time, bond was placed at $250,000.00. Only when Redner agreed he would not again engage in the presentation of the chosen protected expression unless either a Court Order or a License issued pursuant to Citrus County were obtained was his bond reduced and his release affected.

On May 24, 1988, the Citrus County Board of Commissioners met in a regular session and approved Ordinance 88-06, an Adult Entertainment Licensing Ordinance substantially similar to 88-05, but with provisions providing additional bases for license denial and other substantive provisions. Ordinance 88-06 superseded Ordinance 88-05, but both were identical for the purposes of this action. Redner filed separate challenges in the federal district court involving the original ordinance, 88-05, under which he was charged with violating, and its permanent

successor, Ordinance 88-06.[1]

Subsequent to this, Citrus County passed Ordinance 88-A51, an amendment to the Citrus County Zoning Ordinance, establishing zoning and locational restrictions for adult entertainment establishments in addition to the licensing restrictions contained in Ordinance 88-05 and Ordinance 88-06. These restrictions precluded the use of Redner's leased premises as an adult entertainment facility even though it was in a commercially zoned area and not close to any other sensitive zoning uses.

In the state criminal case, Redner was convicted on October 6, 1988 and was sentenced on October 17, 1988. Redner appealed the county court convictions to the Circuit Court for the Fifth Judicial Circuit of Florida, Case No. 88-499-CF. The state circuit court, in its appellate capacity, affirmed the convictions of the trial court and issued its Mandate on August 13, 1990.

Redner subsequently filed a petition for writ of certiorari with the appropriate Florida Fifth District Court of Appeal. The petition was denied on August 31, 1990. Redner then filed a motion for rehearing of said denial, which was itself denied on

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[1] Relying on the abstention doctrine set forth in ***Younger v. Harris,*** 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the district court abstained from deciding the merits of the attacks on both of the licensing ordinances. The court of appeals affirmed the abstention concerning the temporary licensing ordinance, 88-05, but reversed the abstention as to all of 88-06, remanding for consideration Respondents' same claims on that ordinance. ***Redner v. Citrus County, Florida,*** 919 F.2d 646 (11th Cir. 1990). The district court case (No. 88-50-Civ-Oc-10) is pending and the court has ordered that the case be reopened and actively prosecuted.

September 28, 1990, thereby exhausting Redner's state court remedies of the convictions and sentences at issue therein.

In May 1991, Redner was to begin serving the sentences for his state criminal convictions. He first sought a stay of sentence pending appeal under federal habeas corpus from the state county court, which was withdrawn on jurisdictional reasons. Redner was incarcerated *instanter* at the conclusion of the state court hearing. Subsequent to being incarcerated, Redner filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The case was styled ***Redner vs. Dean,*** Case No. 91-90-Civ-Oc-14, U.S.D.C., Middle District of Florida.

On May 6, 1991, Redner filed an emergency motion for stay of state court sentence in federal court. That motion was denied on May 22, 1991. The district court then referred the petition to a magistrate judge and, on March 4, 1992, the magistrate judge issued a Report and Recommendation finding Citrus County Ordinance 88-05 unconstitutional. The magistrate judge found that the Ordinance failed to provide the procedural safeguards necessary for a system of prior restraint because it did not place specific time limits on the decision maker and did not provide for prompt judicial review.

The district court adopted and confirmed the magistrate judge's Report and Recommendation and granted Redner's petition for habeas corpus relief. The court further directed the two respondents in the habeas action, Florida Attorney General Robert Butterworth and Citrus County Sheriff Charles S. Dean, to set aside Redner's convictions, discharge him from any continued restraint, and directed both Respondents to pay Redner's costs.

On May 28, 1992, Florida Attorney General Butterworth made a motion in the habeas case under Rule 59(e), Federal Rules of Civil Procedure, to amend the civil judgment to place the responsibility for costs and for setting aside the conviction on Dean alone. The court granted the motion and, after some dispute regarding the timeliness of Dean's appeal, since a first appeal was filed prior to the determination of Butterworth's motion, and a subsequent appeal was filed after the court relieved Butterworth from the directives of the habeas order, the matter was appealed to the Eleventh Circuit which affirmed the district court in ***Redner v. Dean*** 29 F.3d 1495 (11th Cir. 1994). A copy of this Opinion is set out as Appendix "B" to the Petition. The Mandate issued November 15, 1994.

Petitioner Dean now petitions this Court for a writ of certiorari to review the decisions of the Court of Appeals. The Respondent, Joseph Richard Redner, herein files his Brief in Opposition, explaining to this Court the reasons the writ should be denied.

REASONS FOR DENYING THE WRIT

I. IT IS PROPER IN ASSESSING THE CONSTITUTIONALITY OF AN ORDINANCE TO INITIALLY CONSIDER THE FOURFOLD TEST OF *UNITED STATES V. O'BRIEN* AND, IF JUSTIFYING SAME BY THE *O'BRIEN* TEST, TO THEN EVALUATE THE SAME ORDINANCE FOR THE EXISTENCE OF PROCEDURAL SAFEGUARDS AS REQUIRED BY *FW/PBS, INC., V. CITY OF DALLAS.*

A. *Barnes v. Glen Theater* is irrelevant to the case at hand for the purposes of this petition.

In asserting his reasons for granting the writ, the Petitioner engages in a mystifying recitation of the *Barnes* case and seems to suggest that the circuit court in some way rejected *Barnes* or declined to apply the four part test from *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). This desperate attempt to create some basis to suggest "error" on the part of the circuit court is misleading and inaccurate.

The petition for writ of habeas corpus, which was granted by the district court and affirmed by the circuit court, was predicated on legal points and authorities that clearly recognized the underlying applicability of the First Amendment to local ordinances regulating "sexually oriented" businesses. In *Barnes v. Glen Theatre*, 111 S.Ct. 2456 (1991), the specific questions presented to this Court included: 1) whether nude bar room style "go-go" dancing was "speech" protected by the First Amendment, and 2) if nude bar room dancing was "speech," whether Indiana's general public indecency law was

unconstitutional as applied to such dancing. This Court, in a plurality decision, essentially concluded that adult entertainment exotic dancing, performed for entertainment, *was* expression protected by the First Amendment, even though marginally so. It was further held that under the Indiana statutory requirement, the dancers in the establishments involved in the ***Barnes*** case could be required to wear "pasties and g-strings," and that this was an incidental restriction which did not violate the First Amendment.

In attempting to confuse the First Amendment protections offered the expression presented by Respondent Redner, the Petitioner suggests that somehow Citrus County's Adult Entertainment Licensing Ordinance was not the restraint or censorship of expression, but was actually a regulation of activities that were more "conduct" or some type of commercial activity exempt from any regulatory scrutiny. In asserting this position, the Petitioner ignores years of precedent, clearly indicating that his argument is entirely void of merit. The Citrus County Ordinance, which was the source of the criminal convictions which were the basis of the petition for writ of *habeas corpus,* was not an attempt to require dancers to perform in less than a "nude state" (a la ***Barnes***). Contrary to the Petitioner's self-serving assertions, the Ordinance was, in actuality, the imposition of a licensing scheme, enacted on an "emergency" basis, that would pose a complete prior restraint to the presentation of any protected expression. Attempting to mischaracterize this municipal legislation in order to circumvent First Amendment protections is a deceptive practice that has historically and consistently been exposed and criticized by many courts, including this Honorable Court.

As clearly stated in the majority opinion authored by Justice Rehnquist, and joined in by Justices Kennedy and O'Connor in ***Barnes***:

> "Several of our cases contain language suggesting that nude dancing of the kind involved here is expressive conduct protected by the First Amendment. In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), we said: '[A]lthough the customary barroom type of nude dancing may involve only the barest minimum of protected expression, we recognized in *California v. LaRue, 409* U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.' In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), we said that '[furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation' (citations omitted). These statements support the conclusion of the Court of Appeals that nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." ***Id.***, at 4747.

Justice Souter, concurring in the judgment, stated:

> "Thus, I agree with the plurality and the dissent that an interest in freely engaging in the nude dancing at issue here is subject to a degree of

First Amendment protection." ***Id.***, at 4751.

The most notable impact of the ***Barnes*** decision on the instant case is that it further solidifies the argument that the expression sought to be presented at the establishment Redner attempted to open in Citrus County was, and is, protected by the First Amendment. It also emphasizes the applicability of the ***O'Brien*** test in addressing the validity of the Citrus County Ordinance at issue. The ***Barnes*** case in no way detracts, either directly or indirectly, from the validity of the circuit court's application of the decision in ***FW/PBS v. City of Dallas***, 110 S.Ct. 596 (1990)[2] to the factual scenario experienced by Redner and properly recognized by both the district court and the circuit court as the authoritative test to evaluate the existence of procedural safeguards in legislation such as the Citrus County Ordinance.

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[2] In ***FW/PBS*** Justice O'Connor's plurality Opinion, joined by Justices Stevens and Kennedy, analyzed an adult entertainment licensing ordinance under ***Freedman v. Maryland***, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In ***Freedman***, the Supreme Court held that any system of censorship that runs the risk of suppressing constitutionally protected expression must contain three procedural safeguards designed to obviate the dangers of censorship: (1) the burden of going to court to suppress the speech and the burden of proof once in court must lie with the censor; (2) any restraint prior to a judicial determination may only be for a specified brief time period in order to preserve the status quo; and (3) an avenue for prompt judicial review of the censor's decision must be available. ***Id.*** At 58-59, 85 S.Ct. at 739. In her plurality opinion in ***FW/PBS***, Justice O'Connor found that the first of the ***Freedman*** procedural safeguards is not necessary in a licensing scheme regulating an entire business, as opposed to a scheme like that in ***Freedman*** involving the direct censorship of particular expressive material. Regardless of this fact, the exact same flaws in the ***FW/PBS*** ordinance are blatantly apparent in Citrus County Ordinance 88-05.

The practical result of ***Barnes*** is that it allows communities to enact legislation which impose "time, place or manner" regulations on nude dancers to require those modest decorations referred to by the Court as "pasties and g-strings," since this requirement is the "bare minimum necessary to achieve the state's purpose." This in no way affects the requirement that any such legislation affecting First Amendment activity, even if only marginally protected, must contain the procedural safeguards enumerated in ***FW/PBS v. City of Dallas***.

In addition to the misleading nature of the erroneous distinctions urged by the Petitioner to avoid a First Amendment based analysis, Dean's position conflicts with a long line of this Court's decisions which hold that laws requiring a license to engage in First Amendment activity must be subjected to much more exacting scrutiny than those which license non-expressive conduct. See e.g. ***Shuttlesworth v. City of Birmingham***, 394 U.S. 1417 (1969); ***Saia v. New York***, 334 U.S. 558 (1948); ***Lovell v. Griffin***, 303 U.S. 444 (1938); and ***Thornhill v. Alabama***, 310 U.S. 88 (1940). These cases recognize: (1) that the requirement of a license before one may engage in expression is the kind of prior restraint most hated by the Framers; and (2) such laws must be subjected to the most strict level of scrutiny to ensure against the possibility of censorship under the guise of regulation.

Perhaps the most troubling aspect of the Petitioner's argument is the implicit suggestion that the circuit court rejected or ignored ***Barnes*** or in some way was unaware of the import of the ***O'Brien*** test. This innuendo is entirely without merit, as revealed by the decision itself:

"While it enjoys some degree of First Amendment protection, however, nude dancing is not immune from governmental regulation. Even activity protected by the First Amendment can be regulated if the regulation furthers a substantial government interest and constitutes only an incidental limitation on the expressive activity. *See United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678-79, 20 L.Ed.2d 672 (1968). In *Barnes*, for instance, the Supreme Court found that an Indiana statute requiring dancers to wear pasties and G-strings was not an impermissible infringement on the dancers' rights of freedom of expression. 501 U.S. at 567-68, 111 S.Ct. At 2461. The present case differs from *Barnes* in at least one important respect. While *Barnes* involved some incidental limitations on the conduct associated with the expressive activity, the instant case presents a complete restraint of protected expression.

"The instant case is more analogous to another Supreme Court case, *FW/PBS, Inc. V. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). *FW/PBS* is the Supreme Court's most recent pronouncement on the prior restraint of nude dancing. Because it dealt with a licensing scheme similar to the Citrus County Ordinance, it provides us with valuable insight.
"In *FW/PBS*, the Supreme Court entertained a facial challenge to a Dallas licensing ordinance regulating sexually oriented business. Like the

> Citrus County Ordinance, the Dallas scheme regulated sexually oriented businesses with a system of zoning, licensing, and inspections...." ***Redner v. Dean,*** 29 F.3d 1495, at 1499, 1500 (11th Cir. 1994).

After going through a well-reasoned evaluation of Citrus County Ordinance 88-05, the circuit court came to the inescapable conclusion that the illusory time limits for processing a license application, the total lack of any time limit for an appeal of an erroneous license denial, and the total lack of any opportunity for prompt judicial review rendered Citrus County Ordinance 88-05 blatantly unconstitutional under the tests set forth in ***FW/PBS***.

The Respondent herein does not suggest that Citrus County cannot regulate the activity at issue herein. What he does emphatically submit is that such regulation must first satisfy the ***O'Brien*** test to justify its very existence. Once this is accomplished, then an appropriate analysis must be undertaken to find that the regulation of expressive activity is governed by the adequate procedural safeguards set forth in ***FW/PBS v. City of Dallas***. The circuit court appropriately undertook this sequence in evaluating the instant case and none of the arguments suggested by the Petitioner, confusing though they may be, in any way justify the relief requested from this Court.

B. Satisfaction of the *O'Brien* Test is irrelevant to the case at hand for the purposes of this petition.

In this portion of the Petitioner's arguments for granting the writ, a strong position is set forth in support of the contention

that Citrus County Ordinance 88-05 satisfies the ***O'Brien*** test. While this argument is well presented, it has absolutely no relevance to the case at hand because there was never any issue involving satisfaction of the ***O'Brien*** test. Since most of this material was covered in the previous section of the instant Brief in Opposition, not much additional argument in this regard is necessary. There are, however, some blatant misrepresentations that must be addressed. For example, the Petitioner suggests, "Once an application is properly filed and the establishment is in compliance with all applicable health, safety, and zoning requirements, the County Administrator must grant the license." (Petition at p. 12).

This contention is false and it was the illusory nature of any requirement to issue any license that the circuit court found to render Ordinance 88-05 unconstitutional under the procedural safeguard requirements of ***FW/PBS***. Specifically, the circuit court found that there was no absolute right to operate a First Amendment protected business at the expiration of the forty-five (45) day review period. In addition to this, a second provision of the Ordinance was also found to result in the indefinite suppression of expressive activity. In the event the Administrator denied any such license, an appeal would have to be taken before the Board (which was the very same body which denied the license in the first place). The Ordinance then directed the Clerk of the Board to "schedule a hearing for as soon as the Board's calendar would allow." These nebulous provisions clearly create an ample opportunity to either intentionally, or even negligently, impose an impermissible delay in the presentation of protected expressive activities.

The circuit court recognized that the failure to create an absolute right to engage in expressive activity, coupled with the possibility that protected expression could be restrained for an indefinite period of time prior to any form of judicial review, rendered the Ordinance invalid for failing to impose reasonable time limits on the decision maker as required by ***Freedman,*** *supra,* and ***FW/PBS***.

Finally, although the Petitioner does not really address this issue, the circuit court properly identified that the Citrus County Ordinance did not satisfy the facial requirement that there be the possibility of prompt judicial review in the event a license for engaging in expressive activity was erroneously denied. The circuit court properly identified the Respondent's challenge as a facial one and properly concluded that this additional procedural safeguard was also lacking in the Citrus County Ordinance.

Under any analysis, none of the distinctions suggested by the Petitioner, nor the attempt to create confusion or argue non-issues, should be persuasive to this Court. It is respectfully submitted that none of the arguments submitted by the Petitioner justify granting of the writ.

II. THERE IS NO VALIDITY TO THE SUGGESTION THAT THERE IS ANY "DISCORD" OR "CONFUSION" REGARDING THE TESTS SET FORTH IN *BARNES V. GLEN THEATRE, INC.*, AND *FW/PBS, INC., V. CITY OF DALLAS*, WHEN THERE IS, IN FACT, NO CONFLICT WHATSOEVER BETWEEN THE DECISIONS AND NO EVIDENCE OF A LACK OF UNIFORMITY

The Petitioner in this section again attempts to confuse this Court by suggesting that various courts of appeal are in conflict about the correct test to apply, "***O'Brien*** or ***FW/PBS,***" in determining the constitutionality of laws regulating adult entertainment establishments. Petitioner attempts to confuse the matter further by distinguishing between zoning ordinances, licensing ordinances, or prohibitions of all public nudity. As the Respondent will explain herein, there is absolutely no confusion, no conflict, and, if the parameters of an ordinance are evaluated properly, no discord whatsoever in applying the ***O'Brien*** test, the ***FW/PBS*** test, or both.

When the Petitioner states that, "this confusion is extensive, rampant, and recurrent" it is clear that various courts' chosen use of the application of these different tests is perfectly appropriate and that the only confusion is that experienced (or tactically asserted) by the Petitioner. Essentially, the sequence of the evaluation is quite simple. First, if it is an appropriate issue for analysis in any given case, the ***O'Brien*** test should be utilized to evaluate any regulation that allegedly infringes on constitutionally protected "symbolic speech," when elements of speech and non-speech are combined in the same course of conduct. This test requires that the regulation (1) is within the

constitutional power of the government; (2) furthers an important or substantial government interest; (3) is unrelated to the suppression of free expression; and (4) is an incidental restriction on alleged First Amendment freedoms, no greater than is essential to the furtherance of that interest. This in no way conflicts with the additional evaluation that, if legislation ultimately passes the ***O'Brien*** test and requires the acquisition of a license or permit prior to engaging in First Amendment protected expressive activities, the procedures set forth for obtaining such a license or permit must contain adequate safeguards to prevent the arbitrary or unjustified delay by a decision maker or, if the decision maker's determination is erroneous, the opportunity for an aggrieved party seeking to engage in protected expression to receive prompt judicial review of such prior restraint. In no way are these tests at odds, and there is no legitimate basis to suggest that there has been any conflict or inconsistency precipitated by their application.

A. Review of the Courts of Appeals' decisions reveals no conflict and no inconsistency.

1. *Third Circuit Court of Appeals*

Petitioner cites the case of ***Mitchell v. Commission on Adult Entertainment Establishments***, 10 F.3d 123 (3d Cir. 1993), as the most recent pronouncement by the Third Circuit concerning the regulation of adult entertainment facilities. It is clear from a review of this case that the appropriate evaluation was used. The district court upheld the constitutionality of the

statute at issue therein under ***Renton***[3], but invalidated the adult entertainment commissions' inaction for more than three years on the plaintiff's application for a new license (after an earlier revocation of a previous license), based on the ***FW/PBS*** two-part procedural safeguard test. The Petitioner goes on to note that, in ***Mitchell,*** the court of appeals analyzed the statute's constitutionality under the ***Renton*** time, place, and manner test and further noted that the court acknowledged that this Court, in adopting the ***O'Brien*** analysis in ***Barnes***, indicated that it *paralleled* the analysis applied in ***Renton*** and that courts considering the constitutionality of adult entertainment ordinances "have applied both ***O'Brien*** and ***Renton***, indicating that the outcome is the same regardless of which analytical framework is applied." (Petition at p. 17). This decision clearly shows that the courts are allowed the necessary tools to evaluate the constitutionality of adult entertainment ordinances and that, while there may be some nebulous variation amongst the tests used, none of the tests are in conflict and the outcomes of those determinations would be the same regardless of which tests are used. There is no conflict. There is no confusion.

2. *Fourth Circuit Court of Appeals*

In discussing the Fourth Circuit, the Petitioner analyzes ***DG Restaurant Corp. v. City of Myrtle Beach***, 953 F.2d 140 (4th Cir. 1992). In that case, a fact specific evaluation led the court to

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[3] ***City of Renton v. Playtime Theatres, Inc.,*** 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) is the keystone case regarding the power of local governments to utilize zoning ordinances to regulate adult entertainment establishments so long as those ordinances are aimed at the adverse secondary effects of such establishments and are not otherwise content based.

conclude that the timing of the enactment of the zoning ordinance at issue therein, with the ultimate effect of a ban on public displays of nudity, created a strong inference that the city's primary concern was to restrict the message purveyed by topless dancing and was thus content based and in violation of the First Amendment. Citing ***Barnes*** and utlilizing the ***O'Brien*** test, the court of appeals set forth a comprehensive analysis of the ordinance, and found that, under the ***O'Brien*** test, the ordinance was constitutional. There was no issue whatsoever regarding the issuance of a license and no discussion whatsoever of ***FW/PBS*** because it simply had no relevance to the case.

Amazingly, following this description, the Petitioner then suggests that the Fourth Circuit "with no discernable reasoning or justification, made a complete about-face, and applied the ***FW/PBS*** test to a zoning ordinance regulating adult entertainment businesses" in the decision of ***11126 Baltimore Blvd., v. Prince George's County, Md.***, 32 F.3d 109 (4th Cir. 1994). In that case, the court evaluated whether or not the ordinance challenged constituted a content neutral time, place, and manner restriction which was narrowly tailored to serve the public's interest in minimizing the secondary effects associated with adult businesses. Once determining that this was true, further evaluation was given to the ordinance to decide whether it comported with the procedural safeguards test set forth in ***FW/PBS,*** because the ordinance had a 150-day time period for a special exception, which was a prerequisite to engaging in the expressive activity at issue.

Once again, there is no conflict in these decisions or in the manner in which they apply the respective tests to evaluate their constitutionality. There is no confusion and the authority cited by

the Petitioner merely sets forth the appropriate sequence of evaluation to determine the constitutionality of ordinances similar to the one at issue herein.

3. *Fifth Circuit Court of Appeals*

In ***Lakeland Lounge v. City of Jackson, Miss.***, 973 F.2d. 1255 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1845, 123 L.Ed.2d 469 (1993), the court utilized the ***O'Brien/Renton*** test to determine whether the ordinance at issue therein was content neutral. There was no issue involving whether or not a decision maker could delay the issuance of a license or permit to engage in expressive activity, because the ordinance simply regulated the location of such businesses and did not involve the additional components necessary to invoke an evaluation under ***FW/PBS***.

Again, erroneously confusing the issue, the Petitioner attempts to compare ***Lakeland Lounge*** to ***TK's Video, Inc. v. Renton County, Tex.***, 24 F.3d 705 (5th Cir. 1994) to suggest some type of conflict because the additional use of the ***FW/PBS*** was employed in that case. Clearly the use of the ***FW/PBS*** test was simply the result of the fact that the ***TK's Video*** case involved additional procedures for the review of various applications as a prerequisite to engaging in protected expression. Petitioner suggests that this is an "unusual and confusing twist," but this is entirely inaccurate. The respective tests are nothing more than an appropriate review based on differing characteristics of different ordinances.

The use of these two tests is even more appropriately indicated by Petitioner's referral to ***Grand Brittain, Inc., v. City of Amarillo, Tex.***, 27 F.3d 1068 (5th Cir. 1994). Rather than

"muddy the water," as Petitioner suggests, this case clearly shows the symbiotic nature of the two tests. In ***Grand Brittain,*** the court of appeals considered the constitutionality of the zoning chapter of the city code under the ***O'Brien/Renton*** time place, and manner test, and further evaluated the licensing chapter of the code under the ***FW/PBS*** test. Contrary to what the Petitioner suggests, the court of appeals' utilization of these different tests to evaluate different components of municipal legislation is clearly supported both by this Court's decisions and previous decisions in the Fifth Circuit itself. Indeed, any other type of evaluation would be improper and would clearly fail to recognize the valuable tools that this Court has provided to evaluate legislation such as that at issue herein.

4. *Sixth Circuit Court of Appeals*

Triplette Grille, Inc., v. Akron, Oh., 40 F.3d 129 (6th Cir. 1994), "presented [the court] with the vexing task of divining which of the varied standards enunciated in ***Barnes*** is the law of the land," *id.* at 1233, in order to decide the constitutionality of a city ordinance that prohibited all public nudity.

> "*Barnes* engendered four separate opinions, none of which commanded a majority of the Justices...Justice Souter agreed with the Chief Justice that the Indiana statute was properly analyzed under the four-part *O'Brien* test, [but] he identified material harms, not moral concerns, as the basis for restricting First Amendment protection for expressive conduct."

Id. Under ***Marks v. United States***, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977), "the opinion of the Justice

concurring in the judgment on the 'narrowest grounds' should be regarded as the Court's holding." 40 F.3d at 133.

The Petitioner properly identified the Sixth Circuit's evaluation of the ordinance at issue before them under the ***Barnes*** decision. Once again, there was absolutely nothing in the Petitioner's exercise to indicate any conflict, any confusion, or any basis for this Court to issue the writ.

5. *Eighth Circuit Court of Appeals*

In ***Holmberg v. City of Ramsey,*** 12 F.3d 140 (8th Cir. 1993), *cert. denied,* ___ U.S. ___, 115 S.Ct. 59 (1994), the Eighth Circuit evaluated an adult entertainment zoning ordinance under the ***Renton/O'Brien*** test just as they did in ***Ambassador Books & Video, Inc., v. Little Rock, Ark.,*** 20 F.3d 858 (8th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 186 (1994), and ***ILQ Investments, Inc., v. City of Rochester,*** 25 F.3d 1413 (8th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 578 (1994).

In none of these cases was the Eighth Circuit faced with any necessity to evaluate the ordinances for the existence of procedural safeguards under ***FW/PBS*** because the only necessary evaluation was whether the ordinances were content neutral time, place, and manner regulations designed to serve a substantial governmental interest that did not unreasonably limit alternative avenues of communication. ***FW/PBS*** has no relevance in these cases, and it is erroneous to suggest that there is any conflict or confusion created by the Eighth Circuit's actions in the cases cited by Petitioner.

6. *Eleventh Circuit Court of Appeals*

Contrary to the contention by Petitioner that "the Eleventh Circuit has been equally confusing and inconsistent in using the ***O'Brien*** and the ***FW/PBS*** tests," the fact of the matter is that the Eleventh Circuit, just as every other circuit court, properly distinguishes which test is appropriate depending on the characteristics of the legislation to be evaluated. In ***International Eateries of America, Inc., v. Broward County, Fla.***, 941 F.2d 1157 (11th Cir. 1991), *cert, denied*, ___U.S. ___, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992), ***Barnes*** was relied on. There was absolutely no necessity to invoke the ***FW/PBS*** case because there was absolutely no issue involving the decision making process as a prerequisite to engaging in protected expression.

The Petitioner is entirely incorrect in suggesting that the confusion over the application of either the ***O'Brien*** or ***FW/PBS*** tests comprise two different standards with different objectives. The standards enumerated in each test involve the same objective, that being to determine the constitutionality of municipal legislation. The ***O'Brien*** test, as enumerated in ***Barnes***, is used to determine whether or not a time, place, and manner regulation is content neutral, designed to serve a substantial governmental interest, and not unreasonably limiting alternative avenues of communication. The ***FW/PBS*** test determines whether or not such a regulation contains adequate procedural safeguards. The tests are symbiotic in nature, focus on different characteristics of municipal legislation, and will never generate "completely opposite results."

Citing ***Cafe 207, Inc., v. St. Johns County***, 856 F.Supp. 641 (M.D. Fla. 1994), the Petitioner complains that the application of the ***O'Brien*** test as set forth in ***Barnes*** resulted in the finding that the legislation at issue therein was constitutional and that, in the instant case, the circuit court's reliance on the ***FW/PBS*** case in some way contributed to a determination of invalidity that would not have been reached if only the ***O'Brien*** test had been applied to the Citrus County Ordinance. This suggestion totally ignores the critical characteristics of the Citrus County Ordinance that the circuit court readily recognized, easily evaluated, and properly found to be unconstitutional.

In conclusion, the Petitioner fails to see the most important aspect of the circuit court's opinion in the instant case. Regardless of whether an ordinance is content neutral and regardless of whether the ordinance is in all other respects constitutional, if that ordinance requires a license or permit to engage in protected expressive activities, then that ordinance must contain the procedural safeguards set forth in ***FW/PBS***. The Eleventh Circuit reached the correct opinion and the Petitioner is misguided in making any other suggestion whatsoever.

B. This Court has no obligation to resolve erroneously represented "confusion and conflict."

There is no confusion whatsoever in the application utilized by the various circuits of the various tests described herein. There is no lack of uniformity in the decisions amongst the various federal and state courts, and there is no uncertainty whatsoever regarding the application of the ***O'Brien*** or ***FW/PBS*** tests. The law is well settled and quite clear to anyone familiar with the distinct constitutional issues involved in each of the tests.

There is no requirement or necessity for this Court to provide any "authoritative direction," since it has already done so with great clarity and full effectiveness.

The Petitioner's suggestion that the threat of legal assault discourages or jeopardizes governmental entities from enacting legislation to secure the important basic goals of the health, safety, peace, and general welfare of their citizens completely ignores the fact that the entire basis for this responsibility is grounded in the highest embodiment of the public good--the United States Constitution. The Petitioner's arguments, no matter how well intended, will not suffice to insulate legislation which is blatantly unconstitutional. A nation living under the rule of law can accept no other conclusion.

CONCLUSION

Joseph Richard Redner prays that this Court deny Dean's Petition for Writ of Certiorari because the case presents no issue appropriate for this Court's review and because the lower court's holdings were clearly not in error.

Respectfully submitted,

/s/

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